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Dept. of Consumer and Corporate Affairs.

[Briefs to the Ministers]

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Submission by the Edmonton Chamber of Commerce and the Better Business Bur 1
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SUBMISSION

BY

THE EDMONTON CHAMBER OF COMMERCE

and

THE BETTER BUSINESS BUREAU OF EDMONTON

on

BILL - 21

THE UNFAIR TRADE PRACTICE ACT

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EDMONTON CHAMBER OF COMMERCE

May 9th, 1975

Hon. G. L. Harle
Minister of Consumer and Corporate Affairs
Government of Alberta
425 Legislative Building
Edmonton, Alberta

Dear Mr. Harle:

The Edmonton Chamber of Commerce has reviewed Bill 21 - The Unfair Trade Practice Act which was introduced to the Legislative Assembly during the fourth session of the 17th Legislature.

It is the Chamber's understanding that this Bill will be re-introduced in the spring session of the Legislature which is scheduled to commence on May 15th, 1975.

The Chamber has prepared the attached submission, in conjunction with the Better Business Bureau of Edmonton to express some of the concerns of the Business Community with respect to this Legislation. It is our hope that when a new Bill is drafted, these concerns will be given consideration.

Yours truly,

E. W. King,
President

Copies to: Hon. Peter Lougheed, Premier
Members of Provincial Cabinet
Better Business Bureau
Alberta Chamber of Commerce

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Submission By

The Edmonton Chamber of Commerce

and

The Better Business Bureau of Edmonton

Re: Bill 21 - The Unfair Trade Practice Act

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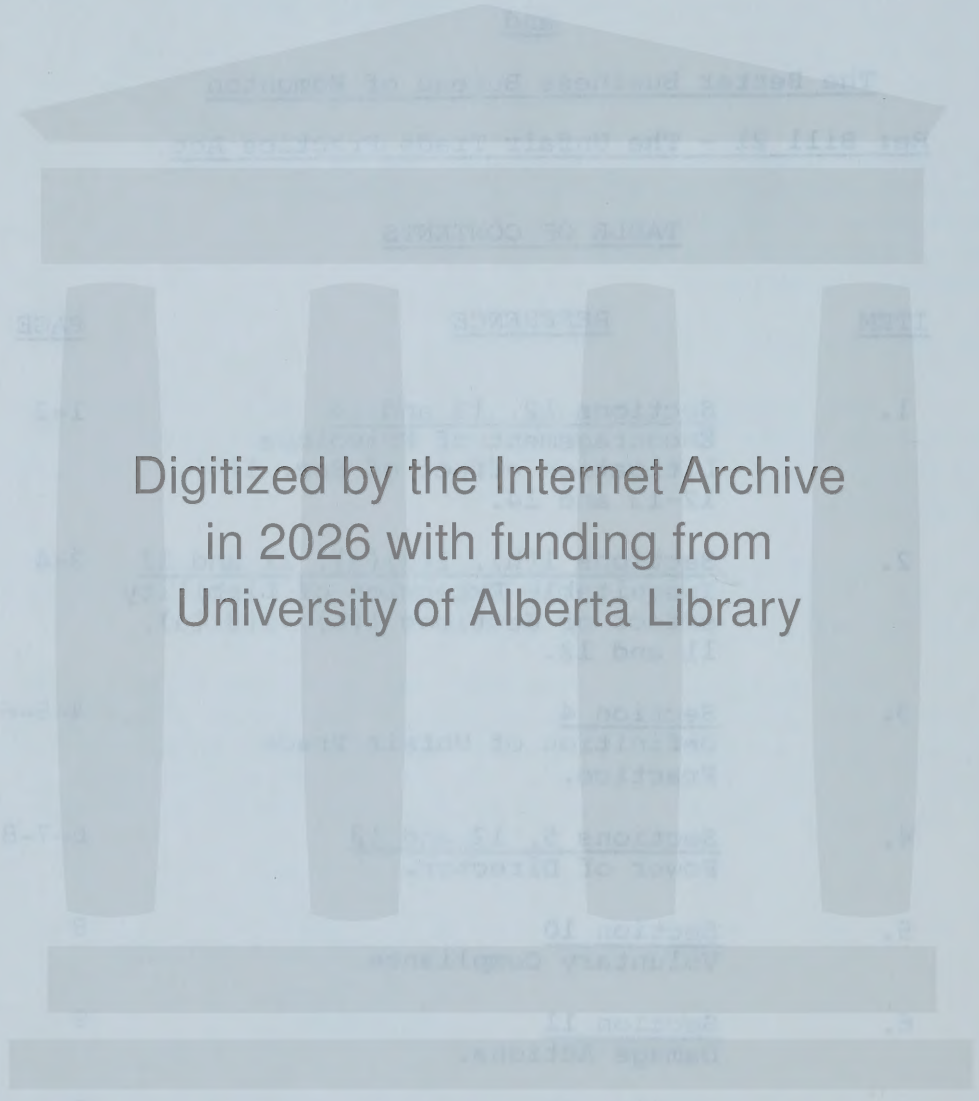

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May 9, 1975

SUBMISSION BY

EDMONTON CHAMBER OF COMMERCE

and the

BETTER BUSINESS BUREAU OF EDMONTON

RE: BILL 21 - THE UNFAIR TRADE PRACTICES ACT

1. ENCOURAGEMENT OF FRIVOLOUS LITIGATION EFFECT OF SECTION 1(b), 12, 13 and 14.

We have given careful consideration to the effect of the definition of "consumer organization" contained in paragraph 1(b) of Bill 21 when read in conjunction with Sections 12, 13, and 14. The definition is very broad and we feel will encourage irresponsible litigation unless Sections 12, 13, 14, relating to the procedures, are modified considerably in order to introduce the controls that are necessary to prevent unwarranted and irresponsible litigation. It is noted that Rules numbered 41 and 42 of the Alberta Rules of Court at present govern the commencement of class actions. These Rules provide as follows:

> "41. In any action for prevention of waste or otherwise for the protection of property, one person may sue on behalf of himself and all other persons having the same or a similar interest.
>
> 42. Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.".

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Class actions can be brought under these sections for the prevention of waste or otherwise for the protection of property, or where numerous persons have a common interest in the subject of an intended action. However, it should be noted that all actions are restricted to cases where the Plaintiff has the same or similar interest as other members of the class or in the words of Rule 42 has "..a common interest in the subject..".

If Bill 21 is passed in its present form, this will be significantly changed and we believe changed to the detriment of all concerned. "Consumer organization" is given a very wide definition and Sections 12, 13, and 14, provide for the commencement of class actions where there is no common interest whatsoever:

> "14(3) A consumer organization bringing a action under this section shall not be required to have an interest in or be affected by the matter in issue in order to commence and maintain the action."

SUGGESTED REMEDY

We would prefer to see this section removed, however, if this is not possible, we suggest that paragraphs 12, 13 and 14 be altered in order to provide that before any class action may be commenced by a consumer organization, the following conditions precedent must be established:

a) The Consumer organization must first have approached the Director with a request that he commence the class action and establish that the Director has refused its petition.

b) The consumer organization should then be required to apply to the Supreme Court of Alberta for leave to commence the action and should be granted leave if, in the opinion of the Court, it has established a 'prima facie' case.

c) Security for costs should be ordered if the Court considers that this should be done.

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This suggestion has a well established precedent in Section 146 of the Alberta Planning Act, which provides that appeals may be made against the decisions of the Development Appeal Board only if leave is granted by the Court of Appeal on the establishment of a 'prima facie' case. This provision is working well and eliminates a great many frivolous actions which would otherwise occur.

2. INEQUITABLE EXTENTION OF LIABILITY: EFFECT OF SECTIONS 1(h), 2(3)(a), 11 and 12.

We are concerned with the definition of the term "supplier" contained in paragraph 1(h) of Bill 21.

This definition appears to greatly enlarge the number of people covered by the use of the term "supplier" in the ordinary sense in that it is extended to cover persons who manufacture, assemble, or produce goods, act as wholesalers or distributors, solicit, advertise or otherwise promote the use of goods. Certainly this is much broader than the meaning of the term in its ordinary sense.

This is particularly of concern to the Chamber when considered in conjunction with the provisions of paragraph 11 of Bill 21, which provides that a consumer may commence an action in Court against any supplier who engaged in or acquiesced in the unfair practice which is the subject matter of the litigation.

Under these provisions the following persons could be the subject matter of litigation as a result of the events which are entirely beyond their control:

a) The issuer of a credit card, who may be very remote from the actual supplier, may become liable for matters over which he has no control and which should strictly be a matter between the supplier (in the ordinary sense of the term) and the consumer.

Section 1(h)(iii) brings the issuer of a credit card within the definition of supplier because he becomes one who is entitled to be compensated by the consumer for the goods and services. Surely this would be unfair when the card was issued forthe convenience of the consumer and the transaction is remote from the issuer of the credit card.

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b) Wholesalers and distributors of goods are covered by the definition. These people often maintain vast warehouses storing consumer goods from many parts of the country or the world. They should not be required to guarantee or become liable for the trade practices of the manufacturers of the products which they store and pass on to retailers.

c) The inclusion of advertisers as contained in paragraph 1(h)(ii)9C) is unfair on the face of it although the exemptions provided in Section 2(3)(a) goes a great distance in correcting this inequity. However, this Section still renders liable the door to door salesman and the display advertiser who prepares material to promote sale in good faith; also the producers of film advertisements and in some cases audio tapes which are used for the promotion of the sale of goods and services.

SUGGESTED REMEDY

These inequitites can be corrected in either of two ways:

a) Restrict the definition of "supplier", or

b) Widen the exemptions set forth in paragraph 2.

In connection with this last suggested remedy it might be appropriate to give the Minister the discretion to declare by regulation that certain persons or classes of persons are not suppliers within the meaning of the Unfair Trade Practices Act. This suggestion has precedent in the provisions of the Direct Sales Cancellation Act.

COMMENTS ON SECTION 4 - DEFINITION OF UNFAIR TRADE PRACTICES.

The comments made in a previous submission on Bill 78 in December of 1974, are still to a large extent valid in our criticism of Section 4 in the new Bill.

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In December, 1974, we made the following comments"

"We agree wholeheartedly (and we think all other objective persons will agree) that all of the types of conduct described in this definition section should be discouraged. None of the conduct described in this lengthly section can, under any stretch of the imagination, be considered "fair". However, we should observe that much of this proposed section creates an overlap with subject matters that have been dealt with under other legislation or under common law. In fact, serious consideration should be given as to whether or not the objectives of Bill 78 cannot be achieved in a more orderly manner by amendments to existing legislation.

An example of the overlapping effect of this legislation is contained in Section 4(1)(d) dealing with misrepresentation and misleading information. This subject matter is dealt with at the present time in the Combines Investigation Act and is elaborated on and expanded in Section 36 of Bill C-2 of the proposed amendments to that Act. We recognize that the Combines Investigation Act is Federal Legislation and is supported constitutionally by decisions that it is criminal legislation. Bill No. 78 deals with the same topic but provides for civil rights and avoids the imposition of penalties in order to avoid a finding by the Courts that it is unconstitutional. Nevertheless the subject matter is the same and we believe that consumers are at the present time free to take civil action for damages as a result of breach of a federal ciminal act."

We note that paragraph 4(d) (xiii) has been changed in Bill 21 to remove the requirement that the representation be made ".to a consumer..".

In our view this makes the definition less acceptable in that it leaves the unfair trade practice less closely defined than it was in the previous Bill.

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We also note that paragraph 4(1)(d)(v) and (vi) and (vii) all deal with the problem of deciding when goods are "..new or unused.." and Section 4(2) makes an attempt to clarify the meaning of this rather uncertain definition.

In our view the repetativeness of the first two Sections and the attempt at clarification set forth in Section 4(2) underlines the uncertainty.

We request that all three sections be reviewed and clarified.

It has also been pointed out that in paragraph 4(d)(vi) the terms "altered, reconditioned, reclaimed" require further definition in order to remove doubt as to their exact meaning in this context.

Section 4(3) provides that an unfair act or practice may occur "...notwithstanding that the consumer transaction is not completed or did not take place...". This appears to us to be unnecessary in view of the fact that if no transaction took place there could not be likelihood of any damage being suffered and since this Act is concerned only with civil rights, this provision appears to be unnecessary.

4. POWERS OF DIRECTOR.

In our submission of December 18th, 1974 relating to Bill 78, we suggested that the powers of the Director were too broad and should be curtailed. In that submission we made the following comments which appear to us to be still relevant in application to the new clauses 5 and 7 in Bill 21:

> "It is respectfully suggested that the powers of the Director are too broad and should be curtailed. Consider clause 5 of Bill 78 which permits the Director, during an inquiry, to require written information from a supplier or the officers or servants of the supplier. This would permit the Director to approach all employees individually and require written statements concerning the business of the supplier. In many cases the servant will not be in a position to give accurate information and the result may work to the detriment of the inquiry. Moreover this provision will permit the Director to conduct a "witch-hunt". His extensive powers should be narrowed and be made more specific.

> With regard to clause 7 of the Bill, it is suggested that there is no need to provide the Director to make an "ex-parte" application. It is a relatively simple matter to give notice to the supplier being investigated and permit him to appear at the time application is made for the Order. In the same clause of the Bill, it is contemplated that the Director may search examine and remove any books, files, papers, documents or things of the supplier. Surely this should be restricted to relevant material. Under this clause, material relating to all the customers of a supplier might be copied and spread far and wide to the detriment of many innocent people. Even if the dissemination of this irrelevant information was not detrimental to the persons involved, there is no reason why the Director should be impowered to obtain and copy private information which is not relevant to the alleged unfair trade practice.".

The only change that has been made in the comparable section of the new Bill appears to be that the Director cannot require "..written.." information under the provisions of the new section.

In our opinion this makes the section even more objectionable because the information which he is authorized to demand under the legislation can now be oral and might, in some circumstances, be misinterpreted by the person who takes the oral statement.

DIRECTOR'S OPINION

Section 12 provides that the Director may commence or maintain a Court action against a supplier where, in his opinion, a supplier has engaged in an unfair act or practice.

Section 13 also provides that the Director may commence and maintain an action where, in his opinion, it is in the public interest to do so. We noted above that we believe it is better to have these actions commenced by the Director than a consumer organization. However, we suggest that both these Sections could be improved by providing that the prerequisite opinion should be that of the Minister and his opinion should state that a 'prima facie'

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case has been established. The Minister is an elected official and if he engages in what would generally be considered an abuse of his power, he can be called to account every time an election is held. We are reluctant to see an employee of the Government delegated such a wide discretion as that contained in Sections 12 and 13, and we recommend that this discretion be exercised by the Minister. The very least that we could recommend here would be that the Director's opinion should be supplemented by the approval of the Minister before he is allowed to commence or maintain the actions contemplated in Sections 12 and 13.

5. VOLUNTARY COMPLIANCE.

Section 10 of Bill 21 contains significant changes from the comparable Section in Bill 78. Most notably it contains a provision for voluntary compliance with the Act, by a supplier who has been paid money or given security by a consumer.

We commend this change and believe that this is a great improvement and an important addition to the legislation.

The only reservation that we have concerning this topic is that subsection (5) of Section 10 provides that the Director shall maintain a public record of all undertakings entered into under the Section. We question the necessity of this subsection and would suggest that it will discourage voluntary compliance agreements. If a supplier enters into a voluntary compliance agreement and subsequently fails to live up to its undertaking, a new unfair trade practice will have been committed and it can be treated on a different basis if the circumstances warrant. A private confession can often have a salutary effect on the confessor. Public humiliation might detract from the effectiveness of this provision. Keeping the list of compliances private will not protect an offender who persists in unfair trade practices because the more stringent remedies are still available for any future transgressions.

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6. DAMAGE ACTIONS - Section 11.

We commend the change in Section 11 which has removed the reference to class actions which was contained in Bill 78. We believe this is an improvement.

However, we feel it could still be improved by removal of reference to actions against suppliers who acquiesce in the unfair trade practice. If the supplier who acquiesces in the unfair trade practice is to be made the subject matter of a damage action, this action should at least be restricted to cases where he knowingly acquiesces.

7. REGULATIONS - Section 20.

We respectfully suggest that the power of the Lieutenant Governor in Council to make regulations as set forth in Section 20(d) is unnecessarily wide. This Section provides the Lieutenant Governor in Council may make regulations "...generally respecting any other matter necessary for the carrying out of the purpose and intent of the Act..".

We are very appreciative of the opportunity that the Government has given our organization and other interested individuals and groups, to study and comment on the proposed legislation. However, under the wide provisions of Section 20, it is conceivable that regulations with the force of law, just as far reaching as the provisions of the Act itself, may be introduced and it is our understanding that the public would not be permitted to study and comment upon proposed regulations to the same extent that they have been permitted to review Bills 78 and 21.

We have no further comments and will appreciate your consideration of our sincere suggestions. We thank you for the opportunity that has been afforded us to study and comment on the proposed legislation.